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GULF COAST ECOSYSTEM RESTORATION COUNCIL

40 CFR Part 1800

Docket Number: 110142014-1111-02

RIN 3600-AA00

RESTORE Act Spill Impact Component Planning Allocation

AGENCY: Gulf Coast Ecosystem Restoration Council.

ACTION: Final rule.

SUMMARY: The Gulf Coast Ecosystem Restoration Council (Council) is issuing a final rule authorizing the Gulf Coast State members of the Council, or their administrative agents, and the Gulf Consortium of Florida counties to apply for grants to fund planning activities to develop individual State Expenditure Plans (SEP) using amounts up to the statutory minimum that each Gulf Coast State must receive under the Spill Impact Component of the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).

DATES: This final rule becomes effective on [insert date of publication in the **FEDERAL REGISTER**].

ADDRESSES: The Council posted all comments to the interim rule on its website, <http://www.restorethegulf.gov/>, without change, including any business or personal information provided, such as names, addresses, e-mail addresses, or telephone numbers. All comments received are part of the public record and subject to public disclosure.

FOR FURTHER INFORMATION CONTACT: Jeffrey Roberson at 202-482-1315.

SUPPLEMENTARY INFORMATION:**I. Background**

The RESTORE Act, Pub. L. 112-141 (July 6, 2012), codified at 33 U.S.C. 1321(t) and note, makes funds available for the restoration and protection of the Gulf Coast Region through a new trust fund in the Treasury of the United States, known as the Gulf Coast Restoration Trust Fund (Trust Fund). The Trust Fund will contain 80 percent of the administrative and civil penalties paid by the responsible parties after July 6, 2012, under the Federal Water Pollution Control Act in connection with the *Deepwater Horizon* oil spill. These funds will be invested and made available through five components of the RESTORE Act. On August 15, 2014, the Department of Treasury (Treasury) issued regulations (79 FR 48039) applicable to all five components, and which generally describe the responsibilities of the Federal and State entities that administer RESTORE Act programs and carry out restoration activities in the Gulf Coast Region.

Two of the five components, the Comprehensive Plan and Spill Impact Components, are administered by the Council, an independent federal entity created by the RESTORE Act. Under the Spill Impact Component (33 U.S.C. 1321(t)(3)), the subject of this final rule, 30 percent of funds in the Trust Fund will be disbursed to the five Gulf Coast States (Alabama, Florida, Louisiana, Mississippi, and Texas) or their administrative agents based on an allocation formula established by the Council by regulation based on criteria in the RESTORE Act. The RESTORE Act establishes a statutory minimum under which each of the five Gulf Coast States is guaranteed five percent of the funds made available under this component. In order for funds to be disbursed to a Gulf Coast State, the RESTORE Act requires each Gulf Coast State to develop a SEP and submit it to the Council for approval. The RESTORE Act specifies the particular

entity within each Gulf Coast State that will prepare the individual SEPs: in Alabama, the Alabama Gulf Coast Recovery Council; in Florida, a consortium of local political subdivisions that includes a minimum of one representative of each affected county (officially named the “Gulf Consortium” as organized under Florida law); in Louisiana, the Coastal Protection and Restoration Authority of Louisiana; in Mississippi, the Office of the Governor or an appointee of the Office of the Governor; and in Texas, the Office of the Governor or an appointee of the Office of the Governor. 33 U.S.C. 1321(t)(3)(B)(iii).

On August 22, 2014, the Council issued an interim final rule to permit the five eligible entities responsible for drafting SEPs to have access to amounts up to the statutory minimum to help draft a SEP that meets all statutory requirements.¹ 79 FR 49690. The Council opened this interim final rule up for public comment for 30 days. The Council received substantive comments from three separate commenters.

After considering public comments, the Council now issues the regulations as a final rule. The rule will take effect on [insert date of publication in the **FEDERAL REGISTER**]. The Council will separately make available a guidance document that details the content and process requirements of both the planning SEP that is required to get access to the planning grants authorized under this rule and the full SEP that is required to get access to the entire amount of funds made available to each Gulf Coast State under the Spill Impact Component of the RESTORE Act. The Council is also currently developing another set of regulations to more fully implement the Spill Impact Component of the RESTORE Act. These regulations will be

¹ SEPs must meet the statutory requirements of the RESTORE Act, including: (1) all projects, programs and activities included in the SEP are eligible activities as defined by the RESTORE Act; (2) all projects, programs and activities included in the SEP contribute to the overall economic and ecological recovery of the Gulf Coast; (3) the SEP takes the Council’s Comprehensive Plan into consideration and is consistent with the goals and objectives of the Comprehensive Plan; and (4) no more than 25 percent of the allotted funds are used for infrastructure projects unless the SEP contains certain certifications from the Gulf Coast State submitting the SEP.

published in the Federal Register at a later date and will establish how funds made available from the Trust Fund will be allocated between the five Gulf Coast States based on the allocation formula.

II. Public Comments and Summary of Final Rule

Each of the five Gulf Coast States, Alabama, Florida, Louisiana, Mississippi, and Texas, are statutorily guaranteed a minimum of five percent of amounts made available from the Trust Fund under the Spill Impact Component.² 33 U.S.C. 1321(t)(3)(A)(iii). The Council originally issued this regulation as an interim final rule in order to facilitate expeditious development of full SEPs by the five entities required by the RESTORE Act to draft the SEPs and thus speed delivery of projects, programs and activities authorized under the Spill Impact Component to help restore and protect the Gulf Coast Region. The Council is now finalizing the rule without substantive change. Instead, minor clarifications have been made to the rule and preamble text to make the intent clearer.

Under this final rule, an amount of funds less than or equal to the statutory minimum allocation (five percent of funds available under the Spill Impact Component) are available to the five eligible entities for development of a planning SEP that funds planning activities only, an eligible activity under the Spill Impact Component. 33 U.S.C. 1321(t)(1)(B)(i)(VIII); 33 U.S.C. 1321(t)(3)(B)(i)(I). Eligible entities include the States of Mississippi and Texas, the Coastal Protection and Restoration Authority of Louisiana, the Alabama Gulf Coast Recovery Council, and the Gulf Consortium of Florida counties.

² A Gulf Coast State may receive more than the statutory minimum depending on the calculation of each Gulf Coast State's share under an allocation formula established by the Council by regulation based on criteria specified in the Act. 33 U.S.C. 1321(t)(3)(A)(ii). The Council is developing a regulation to be published in the Federal Register at a later date establishing this allocation formula.

The preamble to the interim final rule discussed in broad terms the grant submission process. Commenters requested clarification on that process because they felt the interim final rule was unclear on whether an SEP was required for the planning grant authorized by this Rule in addition to a grant application. Commenters also requested that if an SEP is required, that the Council remove that requirement. The Council did not make any changes to the text of the final rule because this issue is not implicated in the text itself. Rather, the Council is clarifying in the preamble that the process for receiving grant funds under the final rule involves two steps. First, the Council's interpretation of the sections of the RESTORE Act that authorize funds under the Spill Impact Component require an SEP prior to any distribution of funds. 33 U.S.C. 1321(t)(3)(B). As such, the Council has no discretion to do away with this requirement. However, the Council feels it is within its discretion to permit a much simpler SEP than would be required in order to receive a full distribution of funds under the Spill Impact Component once the allocation formula is complete. While the Treasury regulations (31 CFR 34.203(a)) state that that eligible entities may apply to the Council for a grant for planning purposes, the Council does not believe these regulations authorize to the Council to distribute such funds without an approved SEP, nor would it be appropriate for the Treasury regulations to do so, since it would be outside the scope of the Act to distribute funds without an SEP. The Council intends to release guidance materials separately from this final rule that will clarify the content requirements associated with a "planning SEP" under this final rule, and differentiating those requirements from those of a "full SEP" that would be required to get a full share of funds pursuant to the Council's allocation formula regulation that is in the process of being drafted. Second, an eligible entity that has submitted a planning SEP and had it approved by the Council would have to complete a standard grant application.

Commenters also pointed out that in Florida, the process for submitting an SEP to the Council involves the administrative step of submitting the SEP to the Executive Office of the Governor of Florida. The Act requires that all SEPs be submitted to the Council by the Gulf Coast State. 33 U.S.C. 1321(t)(3)(B)(i).

The final rule describes the eligible uses for the amounts made available under the final rule as including planning activities related solely to the development of a full SEP, including conceptual design and feasibility studies related to specific projects. It does not include engineering and environmental studies related to specific projects. Commenters pointed out that this definition of planning activities is narrower in scope than the definition provided by Treasury in its regulations (31 CFR 34.2) and asked that the Council modify its definition to match the Treasury definition. This narrower construction was intentional. The purpose of this rule is to permit an eligible entity access to a limited pool of funds in order to draft a full SEP. As such, the definition of planning assistance used in the Treasury regulations is too broad in scope, and would permit engineering and environmental studies related to specific projects or procurement of grant processing systems, activities that the Council does not intend to fund under this final rule. Those sorts of activities will be eligible uses once the full amount of funds is available under the Spill Impact Component pursuant to the forthcoming allocation formula. At this time, however, those sorts of activities are beyond the narrowly tailored purpose of this final rule, which is to fund the drafting of a full SEP only.

Similarly, the final rule does not permit any pre-award costs incurred prior to the date of publication of the interim final rule on August 22, 2014, and provides that any pre-award costs incurred after that publication will be evaluated pursuant to 2 CFR Part 200. Commenters requested that the Council remove this time limitation on when pre-award costs were incurred.

The final rule retains this time limitation because of the narrow purpose of the rule, to fund the drafting of a full SEP. Under 2 CFR 200.458, pre-award costs must be directly linked to a particular grant and until the announcement of the interim final rule on August 22, 2014, eligible entities did not know that the Council would award grants for the purpose of drafting a full SEP. As such, the Council does not feel it is unreasonably constraining pre-award costs by imposing a limitation that it will consider pre-award costs only if they were awarded after August 22, 2014. Further, to the extent that an eligible entity incurred costs prior to August 22, 2014, that the entity thinks would qualify as legitimate pre-award costs under 2 CFR 200.458, the entity is free to request funding for such costs under the awards issued when a full SEP is submitted in order to access the full allocation under the Spill Impact Component.

Commenters also advocated for changing the Rule to provide for a clear path for funding the Gulf Consortium of Florida. Given the narrow purpose of this Rule, to fund the drafting of a full SEP, the Council feels that this request goes beyond the scope of this Rule. Whether Spill Impact Component funds are available for this purpose is best addressed in the entity's application for pre-award costs associated with the full SEP required to access the full allocation under the Spill Impact Component or under the Council's broader forthcoming regulation establishing the allocation formula. The Council will keep this comment in mind as it drafts that future regulation.

Finally, commenters requested that all forthcoming guidance and rulemakings from the Council be promulgated in a manner that will allow for comments prior to them being finalized, consistent with the Administrative Procedure Act, 5 USC 553. As is its custom, the Council intends to comply with the requirements of the Administrative Procedure Act.

Minor clarifying edits were made to sections 1800.1 and 1800.20 to remove confusing, superfluous references to the fiscal year. The minimum allocation amount available to each Gulf Coast State will be at least equal to 5% of the total amount available in the Trust Fund for the Spill Impact Component over the life of the Trust Fund.

III. Procedural Requirements

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The Council hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities, for the following reasons.

This final rule only affects those Gulf Coast States that are eligible recipients of these funds, and States are not considered “small entities” under the Regulatory Flexibility Act. For two Gulf Coast States, Alabama and Florida, the Act mandates that entities not officially part of the Executive Office of the State’s government develop the SEPs. The Alabama Gulf Coast Recovery Council, in the context of the Act, serves as an administrative agent of the State of Alabama, so the effects of this rule are still directed solely at the State. For the State of Florida, while the Gulf Consortium of counties is tasked with developing the SEP, it is a consortium of 23 counties with a total population of greater than 50,000. As such, neither entity is considered “small entities” under the Regulatory Flexibility Act.

Additionally, while this final rule describes procedures concerning the allocation and expenditure of amounts from the Trust Fund under the Spill Impact Component, most of these

requirements come from the RESTORE Act itself or other Federal law. The RESTORE Act determines the statutory minimum percentage of funds available to the Gulf Coast States under the Spill Impact Component.

Because no small entities will be impacted by this final rule, no initial regulatory flexibility analysis is required, and none has been prepared.

B. Paperwork Reduction Act

The collections of information contained in this final rule would at most require submissions of grant paperwork from five entities (four of the Gulf Coast States, or their administrative agents, and the Gulf Consortium) below the threshold requirement for application of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). As such, any request for information under this final rule is not considered a “collection of information” subject to the Paperwork Reduction Act of 1995.

C. Regulatory Planning and Review (Executive Orders 12866 and 13563)

As an independent federal entity that is composed of, in part, six federal agencies, including the Departments of Agriculture, the Army, Commerce, and the Interior, the Department in which the Coast Guard is operating, and the Environmental Protection Agency, the requirements of Executive Orders 12866 and 13563 are inapplicable to this final rule.

List of Subjects in 40 CFR Part 1800

Coastal zone, Fisheries, Grant programs, Grants administration, Gulf Coast Restoration Trust Fund, Gulf RESTORE Program, Intergovernmental relations, Marine resources, Natural resources, Oil pollution, Research, Science and technology, Trusts, Wildlife.

Dated: December 8, 2014.

Justin R. Ehrenwerth,

Executive Director, Gulf Coast Ecosystem Restoration Council.

For the reasons set forth in the preamble, the Gulf Coast Ecosystem Restoration Council amends 40 CFR chapter VIII, by revising part 1800 to read as follows:

PART 1800 –SPILL IMPACT COMPONENT

Subpart A – Definitions

Sec.
1800.1 Definitions.

Subpart B – Minimum Allocation Available for Planning Purposes

Sec.
1800.10 Purpose.
1800.20 Minimum allocation available for planning purposes.

Authority: 33 USC 1321(t).

Subpart A – Definitions

§ 1800.1 Definitions.

As used in this part:

Gulf Coast State means any of the States of Alabama, Florida, Louisiana, Mississippi, and Texas.

Gulf Consortium means the consortium of Florida counties formed to develop the Florida State Expenditure Plan pursuant to 33 U.S.C. 1321(t)(3)(B)(iii)(II).

Minimum allocation means the amount made available to each Gulf Coast State which totals at least five percent of the total allocation made available under the Spill Impact Component.

RESTORE Act means the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012.

Spill Impact Component means the component of the Gulf RESTORE program authorized by section 311(t)(3) of the Federal Water Pollution Control Act (33 U.S.C. 1321(t)(3)), as added by section 1603 of the Act, in which Gulf Coast States are provided funds by the Council according to a formula that the Council establishes by regulation, using criteria listed in the Act.

State Expenditure Plan means the plan for expenditure of amounts disbursed under the Spill Impact Component that each Gulf Coast State must submit to the Council for approval.

Subpart B – Minimum Allocation Available for Planning Purposes

§ 1800.10 Purpose.

This subpart establishes that up to the statutory minimum allocation (five percent) is available under the Spill Impact Component of the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act) (Pub. L. No. 112-141, 126 Stat. 405, 588-607) for planning purposes associated with development of a State Expenditure Plan.

§ 1800.20 Minimum allocation available for planning purposes.

A Gulf Coast State or its administrative agent, or the Gulf Consortium, may apply to the Council for a grant to use the minimum allocation available under the Spill Impact Component of the RESTORE Act for planning purposes. These planning purposes are limited to development of a State Expenditure Plan, and includes conceptual design and feasibility studies related to specific projects. It does not include engineering and environmental studies related to specific projects. It also does not include any pre-award costs incurred prior to August 22, 2014.

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